Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of	)	MM Docket No. 99-339
Video Description of	)	
Video Programming	)	
	)	

COMMENTS OF A&E TELEVISION NETWORKS

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EXECUTIVE SUMMARY

A&E Television Networks ("AETN") supports the petitions seeking reconsideration of the Commission's Report and Order in *Implementation of Video Descriptions of Video Programming*, MM Docket No. 99-339, FCC 00-258 (August 7, 2000) ("*Report and Order*"), which adopted rules mandating the provision of video description by certain broadcasters and MVPDs. The petitions for reconsideration bring three issues into stark relief. First, a significant portion of the visually impaired community who were the intended beneficiaries of the new rules seriously question the value of video description and the adoption of FCC rules mandating it. Second, the Commission has grossly overstepped its statutory authority under Section 713 of the Communications Act by adopting video description rules of any kind, let alone those that require broadcasters and MVPDs to provide video descriptions. Third, the Commission substantially underestimated the extent to which providing video descriptions is content-based, and as a result has adopted unconstitutional compelled speech regulation by mandating the provision of video-described programming. AETN submits, therefore, that the Commission should grant the petitions for reconsideration and rescind the mandatory video description rules adopted in the *Report and Order*.

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A&E Television Networks ("AETN"), by counsel and pursuant to Section 1.429(f) the Commission's rules, 1/ hereby extends its support to the petitions for reconsideration filed in the captioned matter. AETN submits that the FCC, without uniform support from the constituency whose interests it claims to be advancing, and absent statutory authority to act, has unlawfully imposed upon the video programming industry forced speech regulation in the form of mandatory video description. While making video programming more accessible to the visually impaired is a laudable goal, the Commission should reconsider its actions in pursuit of that goal. Adoption of mandatory video descriptions violates well-established tenets of statutory interpretation and long-standing maxims of constitutional law, and it fails to meet the needs of a significant portion of the intended beneficiaries of the new rules. The Commission should thus rescind its video description rules.

1/ 47 C.F.R. § 1.429(f); *see* Public Notice, *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, Report No. 2447 (released Oct. 19, 2000), published in 65 Fed. Reg. 64441 (October 27, 2000) (announcing filing of petitions for reconsideration of *Implementation of Video Descriptions in Video Programming*, MM Docket No. 99-339, FCC 00-258 (released August 7, 2000) ("*Report and Order*")).

I. THE COMMISSION SHOULD RETRACT ITS VIDEO DESCRIPTION RULES AND REEXAMINE ITS EFFORTS TO MAKE VIDEO PROGRAMMING MORE ACCESSIBLE TO THE VISUALLY IMPAIRED

Petitioners support the goal of making televised programming more accessible to the visually impaired, but the means the Commission chose in this proceeding to do so are ill-suited to the task. Aside from the statutory and constitutional infirmities outlined below, the petition for reconsideration filed by the National Federation of the Blind ("NFB") demonstrates that a significant portion of the intended beneficiaries of video descriptions question the value of the new rules. More to the point, as NFB puts it, "[t]he Commission's choice of described entertainment over accessible information is a misperception of [a] need coupled with an offensively meaningless solution to address it." NFB at ¶ 6. Given the significant financial burden arising from mandatory video description, 2/ it is clear that the FCC has bought little added value with the substantial funds it will require many broadcasters, MVPDs, and programmers to spend on video description. This burden, and its related marginal benefits, coupled with the significant legal deficiencies in the *Report and Order*, all argue in favor of adopting NFB's solution for the shortcomings of this proceeding, *i.e.*, "rescinding the final rule and beginning the proceeding again," this time taking notice of the limits on FCC authority to mandate video description, and the real needs and priorities of the visually impaired. 3/

2/ *See, e.g.*, National Association of Broadcasters ("NAB") at 6-8; DirecTV, Inc. ("DirecTV"), at 9-12; *see also Report and Order* at ¶¶ 22, 28.

3/ *See* NFB at 1 & ¶ 7; *see also Report and Order*, Statement of Harold W. Furchgott-Roth, Concurring in Part and Dissenting in Part ("Furchgott-Roth Statement") at 2 ("one would have to be particularly astute, even psychic, to glean" from the *Report and Order* "the express opposition of the [NFB], the largest and most historically significant force of and for the blind").

II. THE COMMISSION'S ADOPTION OF MANDATORY VIDEO DESCRIPTION RULES IS LEGALLY UNSOUND

Many of the petitioners correctly argue that by imposing mandatory video description, the Commission has exceeded the bounds of statutorily and constitutionally permissible regulation. 4/ Indeed, in separate statements accompanying the *Report and Order*, both Commissioner Furchgott-Roth and Commissioner Powell acknowledge that the Communications Act does not authorize the FCC to adopt video description rules, and in fact, can be fairly read only as *denying* authority to do so. 5/ In addition, the Commission has clearly "understate[d] the extent to which its new video description rules are content-based," MPAA at 7, and, accordingly, has unconstitutionally compelled speech by the media outlets subject to the new video description rules. AETN submits that the Commission should grant the petitions for reconsideration and dismantle its newly adopted regime of mandatory video description.

A. The Commission Lacks Statutory Authority to Mandate Video Description

The instant petitions for reconsideration, together with the separate statements of Commissioners Powell and Furchgott-Roth, support the conclusion that the Commission exceeded its statutory authority when it adopted the mandatory video description rules. The Commission acknowledges, as it must, that a strong case was made prior to adoption of the video description rules that Congress did not intend to

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4/ National Cable Television Association ("NCTA") at 2-7; NAB at 8-11; Motion Picture Association of America ("MPAA"), *passim*, DirecTV at 4-7; EchoStar Satellite Corporation ("EchoStar") at 2-8.

5/ Furchgott-Roth Statement at 1-2; *Report and Order*, Separate Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part ("Powell Statement") at 1-5.

authorize the FCC engage in such rulemaking. 6/ Those arguments are no less weighty now that the Commission, over the objections of two of its members, has nevertheless forged ahead and adopted rules.

Even a modestly careful reading of the whole of Section 713 and its legislative history leads to the conclusion that Congress did not intend the FCC to adopt video description rules. 7/ Section 713(a) required the Commission to conduct a closed captioning inquiry and report its findings to Congress, and Sections 713(b) and (c) required prescription of closed captioning regulations and compliance deadlines. 8/ Section 713(f) required the Commission to commence a video description inquiry and report its findings to Congress, but it contains no provision for FCC-prescribed video description rules. 9/ The lack of such a provision was no accident. The House version of the bill that became Section 713(f) included language authorizing the FCC to adopt regulations it deemed necessary to promote accessibility of video programming by the visually impaired, but that language was purposefully dropped prior to enactment. 10/

6/ *Report and Order*, ¶ 58 (citing AETN, HBO, MPAA, NAB and NCTA comments).

7/ *See* 47 U.S.C. § 713 ("Video Programming Accessibility").

8/ *Id.*, §§ 713(a)-(c).

9/ *See id.*, § 713(f).

10/ The Conference Report noted that the final legislation deleted the House provision referencing Commission rulemaking authority with respect to video description. S. Conf. Rep. No. 230, *reprinted in* 1996 U.S.C.A.A.N. 1, 197 ("The conference agreement adopts the House provision with modifications which . . . delete[ ] the House provision referencing a Commission rulemaking with respect to video description.").

Thus, Congress considered authorizing FCC-prescribed video description rules, but it expressly declined to do so. 11/

It is well-settled that legislative processes such as those described above must be viewed as intentionally denying to an administrative agency the power to adopt rules that Congress considered authorizing but rejected. Statutes that provide authority for an action, but are completely silent as to similar, related actions, must be interpreted as authorizing only the former, and not the latter. 12/ Section 713 illustrates this point perfectly – it required the FCC to conduct inquiries on both closed captioning and video description, but authorized FCC adoption of only closed captioning rules. This leads unavoidably to the conclusion that Section 713(f) did not empower the FCC to adopt video description rules. Where Congress, as with Section 713(f), expressly considers authorizing FCC action but declines to do so, the Commission may not manufacture rulemaking authority though creative interpretation of the law. 13/

11/ *See* EchoStar at 2 ("the deletion of a provision by a conference committee 'militates against a judgment that Congress intended a result that it expressly declined to enact'") (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-200 (1974)).

12/ *Original Honey Baked Ham Company v. Glickman*, 172 F.3d 885, 887 (D.C. Cir. 1999) ("A statute listing the things it does cover exempts, by omission, the things it does not list. As to the items omitted, it is a mistake to say that Congress has been silent. Congress has spoken – these are matters outside the scope of the statute.") (*citing Engine Mfrs. Assn. v. EPA*, 88 F.3d 1075, 1088 (D.C. Cir. 1996) (if the text of a statute clearly requires a particular outcome, then the mere fact that it does so implicitly rather than expressly does not mean that it is "silent" in the *Chevron* sense) (*citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)); *see also Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion."); *Reno v. ACLU*, 521 U.S. 844, 871 (1997).

13/ *Chevron*, 467 U.S. at 842-843 (1984); *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 228 (1994). *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), reinforces the position that the FCC may not interpret the Telecommunications

There is no basis for the Commission's conclusion that it may impose video description requirements. First, the Commission admits that the "statutory history indicates that section 713 should not be construed to authorize a Commission rule-making" on video description. 14/ Then it agrees that "if section 713 prohibited us from adopting video description rules we could not rely on our general rulemaking authority to do so." *Id.*, ¶ 59. The Commission concludes, however, that because Section 713 does not *prohibit* video description rulemaking, but rather merely *declined to authorize* such action, reliance upon general rulemaking authority to adopt video description rules is permissible. 15/ This reasoning flies in the face of the well-settled rules discussed above for interpreting statutory provisions and legislative history. The purported distinction between conscious legislative decisionmaking to not authorize regulatory action on a matter, and an explicit prohibition of such action, is wholly contrived. 16/

Reliance on general rulemaking power under Sections 4(i) and 303(r) of the Act is wholly misplaced for other reasons as well. 17/ The *Report and Order*'s sup-

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Act as authorizing video description rules. In *Brown & Williamson Tobacco Corp.*, the Court held, upon examination of 21 U.S.C. § 301, that the FDA was not empowered to regulate tobacco products as "drugs" or "devices," given that "Congress considered and rejected bills that would have granted the FDA such jurisdiction." *Id.* at 21.

14/ *Report and Order*, ¶ 58 (citing H.R. Conf. Rep. No. 458, 104th Cong. 2d Sess. 184 (1996)).

15/ *See* NAB at 10 ("The majority of Commissioners [ ] contended that the Commission possess the statutory authority to adopt mandatory video description requirements because Congress did not specifically prohibit the Commission from doing so. This approach turns administrative law upside down.") (citation omitted).

16/ EchoStar at 3 ("What was deleted was the grant of *authority*[.] Congress initially said that the Commission *may* promulgate rules, and then elected to delete that grant of authority.") (emphasis in original) (citation omitted).

17/ *Report and Order*, ¶ 58, 60 (citing 47 U.S.C. §§ 154(i), 303(r)).

position that Section 713(f)'s clear intent not to authorize video description rulemaking by the FCC "does not displace the [ ] more general rulemaking powers . . . in sections 4(i) and 303(r)," *id.*, is at odds with precedent holding that (i) specific statutory provisions govern the general, 18/ and (ii) Title I of the Act confers on the FCC only that power necessary to carry out its specific statutory responsibilities. 19/ The specific denial of FCC authority to adopt video description in Section 713 thus controls any general provision in the Act under which authority to adopt video description rules might otherwise be claimed. In addition, as applied to cable, the "general powers" in Section 4(i) must give way to not only the specific intent of Section 713(f), but also Section 624(f)'s prohibition against cable content regulation, including video description, which as we show below is clearly content-specific regulation. 20/ The FCC should recognize as much and grant the petitions for reconsideration calling for repeal of the video description rules. 21/

18/ *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one"); *accord*, *American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1042 (D.C. Cir. 1999).

19/ *See* DirecTV at 5 (citing *California v. FCC*, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990) (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 158 (1968)).

20/ *See* NCTA at 4 ("Congress removed the FCC's ability to rely on ancillary authority – under Sections 1, 4(i) or elsewhere in the Communications Act – to regulate the content of cable .") (citing 47 U.S.C. § 624(f) ("Any Federal agency . . . may not impose requirements regarding the . . . content of cable services, except as expressly provided in this title."); Furchgott-Roth Statement at 2 n.3).

21/ Even if the language and legislative history were not sufficiently clear to preclude FCC adoption of video description rules – which they are – Section 713(f) must still be construed in a manner that avoids constitutional infirmity, which, as shown *infra* at Section II.B., the Commission has failed to do. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575-576 (1988) ("where an otherwise acceptable construction of a statute would raise serious

B. Mandatory Video Descriptions Violate the First Amendment

Among the shortcomings of the *Report and Order* brought into stark relief by the petitions for reconsideration here is that government-mandated video description compels speech in violation of the First Amendment in two entirely different, but equally unconstitutional ways. First, as the MPAA notes:

> [A]ttempt[ing] to downplay the First Amendment . . . implications of the rules is dubious at best. Nothing the Commission says can obscure the fact that new content must be created and added to an existing program. [T]he initial phase of video description is "writing a script to describe key visual elements." This script is content. The addition of that content to the program is compelled speech [and] a complied modification of a creative work. 22/

In addition, adoption of the video description rules means that the FCC has usurped the power of broadcasters and MVPDs to decide how to use the one and only secondary audio program ("SAP") channel at their disposal. As DirecTV explains, this "places undue constraints . . . on [the] ability to engage in other types of speech," in that:

> DirecTV is among the first MVPDs to respond to increased consumer demand for Spanish-language programming by launching DirecTV PARA TODOS™[.] DirecTV utilizes the [SAP] channel, where available, for Spanish language programming. * * * * [A]ny mandate to provide video description . . . will preclude [this] use of the [SAP] channel. 23/

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constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

22/ MPAA at 7 (quoting *Report and Order*, ¶ 11); *see also* Powell Statement at 8 ("Video description is a creative work. It requires artistic and editorial judgment.").

23/ DirecTV at 6-7 (citations, footnotes and parentheticals omitted); *see also* HBO at 4-6 (seeking exemption from the video description rules, in part due to significant commitment to use SAP channel for Spanish-language programming). DirecTV and HBO make it clear that the Commission's supposition that "video description will not burden any more speech than necessary" *Report and Order*, ¶ 65, is misplaced. Government-imposed requirements that relegate use of the SAP channel to video descriptions that are of little value to many of those who might make use of them, *see*

Thus, the video description rules force media entities (i) to speak when absent a government mandate they might say nothing, and (ii) to engage in speech different from that they would engage in absent a government mandate. Mandatory video description requirements are therefore unconstitutional, and the FCC should reconsider its imposition of those requirements by repealing the rules it adopted in the *Report and Order*.

It is well-settled that the type of government-compelled speech cited by the MPAA and DirecTV in their petitions here, and by others at earlier stages in this proceeding, 24/ exceeds the bounds of what the Constitution allows. The First Amendment protects not only the government's ability to restrict what a person can say, but also prevents the government from forcing a speaker to communicate. 25/ The FCC's attempt to defend its decision to require video description as permissible content-neutral regulation is therefore wholly unpersuasive, for several reasons.

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supra Section I, deeply affect a great number Spanish-speaking viewers who might otherwise have access to Spanish-language programming, and they deprive broadcasters and MVPDs the ability to serve those viewers in a commercially viable manner. *See* Powell Statement at 8 ("there are other uses for the SAP channel, such as Spanish language translation, that a provider must forego in order to comply with the Commission's mandate").

24/ *See Report and Order*, ¶¶ 63 & n.159 (citing comments by AETN, C-SPAN, Lifetime, MPAA, NAB, NCTA and Radio-Television News Directors Association).

25/ *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 573 (1995) ("Since *all* speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say[.]") (emphasis in original) (quotation and citation omitted); *Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781, 796-797 (1988) ("the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say"); *see also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[F]reedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all.").

First, any FCC attempt to regulate cable network content – either directly or by "deputizing" MVPDs – raises serious First Amendment concerns. Given that cable service lacks the "special characteristics" of over-the-air broadcasting's use of limited radio spectrum, any content-based regulation must face strict scrutiny. 26/ In *Turner*, the Court noted the "fundamental technological differences between broadcast and cable transmission," and found that applying "the more relaxed standard of scrutiny adopted in . . . broadcast cases is inapt when determining the First Amendment validity of cable regulation." *Id.* at 639. Because government-mandated video description constitutes compelled speech, for which the FCC has not even attempted to show compelling government interests, let alone how the requirements are narrowly-tailored to advance them, the video description rules adopted in the *Report and Order* are constitutionally unsound and must be reconsidered

Second, even if newly created video description scripts bear some relation to content that speakers have already chosen to present visually, that alone does not save the video description rules from being unconstitutional compelled speech. 27/ The Commission suggests that the video description rules merely "require a programmer to express what it has already chosen to express in alternative format," and that they "are comparable to a requirement to translate one's speech into another language." 28/

26/ *United States v. Playboy Entertainment Group, Inc.*, ___ U.S. ___, 120 S.Ct. 1878, 1887 (2000);*Turner Broadcasting System v. FCC*, 512 U.S. 622, 637 (1994) ("the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, . . . does not apply in the context of cable regulation.").

27/ *Cf.*, *Riley*, 487 U.S. at 797-798 (rejecting argument that the government may compel statements of fact rather than opinion, noting that "either form of compulsion burdens protected speech.").

28/ *Report and Order*, ¶ 63.

However, the petitions for reconsideration filed by the MPAA and DirecTV belie this facile assertion. The video description rules require content that the program producer chose to communicate only visually be presented aurally as well; it also requires that someone, often other than the author, choose how to verbally describe the visual information. 29/ This is not mere "translation" or "expression in an alternate format," but rather creative work that would not be undertaken but for a government mandate. There is thus no escaping that the video description rules compel programmers to provide new and different texts other than those they would otherwise produce.

Finally, even if mandatory video description confers meaningful benefits on some segments of the population, 30/ the decision to compel speech to secure those benefits is not "unrelated to content" and is therefore unconstitutional. 31/ Clear signals in the market for video programming have lead many sources to declare – both explicitly and through their actions – that they wish to use the SAP channel to present shows in Spanish and/or to offer Spanish translations of English-language shows, rather than to provide video described programming. 32/ The Commission's decision to command them to instead use the SAP channel, at least part of the time, for video-described

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29/ *See supra* note 22 and accompanying text; s*ee also*, *e.g.*, Powell Statement at 7 ("[T]he *Order* wrongly analogizes the ease of video description to closed captioning. It is important to note that video description is a creative work. It requires a producer to evaluate a program, write a script, select actors, decide what to describe, decide how to describe it and choose what style or pace.").

30/ *See Report and Order*, ¶¶ 64-65.

31/ *Id.* ¶ 62 ("The purpose of our video description rules . . . is not related to content.").

32/ HBO at 2-6; DirecTV at 6-9; see also Powell Statement at 7 ("there is some evidence that suggests that the market [for video description] has failed because there is not substantial demand by the blind community for such programming").

programming rather than Spanish-language programming is based *entirely* on the content of the speech that might otherwise be presented on the SAP channel. The FCC's substitution of its preference for that of market forces and/or the editorial choices of video programmers is therefore content-based regulation which the FCC has not justified under prevailing First Amendment precedent. 33/

III. CONCLUSION

For the foregoing reasons, AETN respectfully urges the Commission to reconsider and rescind its rules imposing mandatory video description.

Respectfully submitted

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33/ *See, e.g., U.S. v. Playboy*, ___ U.S. at ___, 120 S.Ct. at 1886, 1888 (content-based regulation must satisfy strict scrutiny, under which the government bears the burden of demonstrating that the regulation is narrowly tailored to promote a compelling government interest).

CERTIFICATE OF SERVICE

I, Venita Otey, an employee at the law firm of Hogan & Hartson, certify that I have, on this November 13, 2000, caused to be delivered a copy of the foregoing Comments of A&E Television Network to be served via first class mail, postage prepaid to the following:

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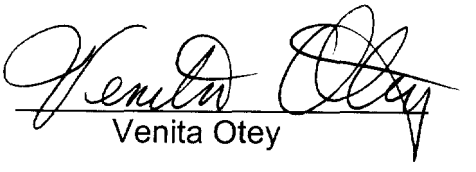

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